



S.A.No.600 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.06.2024

CORAM :

THE HONOURABLE MRS. JUSTICE T.V. THAMILSELVI

S.A.No.600 of 2010

Shanthi

... Appellant

Versus

1.Pazhanirajan

2.Maheshwari

3.Amudhaa

(RR2 and 3 brought on record as LR's of the deceased sole respondent vide Court order dated 12.03.2021 made in CMPs 24499, 24502, 24505/2019 in SA 600/2010-RNMJ)

4.B.Sivakumar

... Respondents

R4 impleaded as party vide Court Order dated 24.03.2021 made in MP.No.2 of 2010 in S.A.No.600/2010 (RNMJ)

Second Appeal filed Under Section 100 of the Code of Civil Procedure, praying to set aside the Judgment and decree passed in A.S.No.69 of 2009 dated 26.02.2010 on the file of the Court of Principal Subordinate Judge, Mayiladuthurai in reversing the judgement and decree passed in O.S.No.256 of 2003 dated 29.09.2009 on the file of the Court of District Munsif, Sirkali.

For Petitioner : Mr.A.Muthukumar

For R1 : Died



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For R2 & R3 : Mr.Arun Anbumani
for Mr.V.Sakkaraipani
For R4 : Mr.V.V.Sathya

ORDER

The appellant has filed this second appeal to set aside the Judgment and decree passed in A.S.No.69 of 2009 dated 26.02.2010 on the file of the Court of Principal Subordinate Judge, Mayiladuthurai in reversing the judgement and decree passed in O.S.No.256 of 2003 dated 29.09.2009 on the file of the Court of District Munsif, Sirkali.

2. The appellant herein is the plaintiff in the suit in O.S.No.256 of 2003, on the file of the District Munsif, Sirkali. Originally, the plaintiff filed a suit against the respondent for the relief of declaration and other consequential reliefs, claiming a right over the property based upon the Will dated 07.03.2001, said to be executed by one Kalyani, who is her mother's sister. The defendant is the son, who was bone to the 2nd wife of her father Ganesan.

3. The contention of the defendant is that the plaintiff is not entitled to the property as per the Will dated 07.03.2001. On the other hand, the said Kalyani executed the last will on 26.12.2002, through which she executed most of the property to the defendant, thereby denied the plaintiff's right over



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the property.

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4. Before the trial Court, both the parties adduced oral and documentary evidence and examined witnesses of the Will on their side. On considering the oral and documentary evidence, the learned trial Judge framed three issues and finally held that the Will relied upon by the plaintiff dated 07.03.2001 was proved. On the other hand, the Will dated 26.12.2002 relied upon by the defendant has not been proved. Accordingly, the decree was in favour of the plaintiff. Against which the defendant has preferred an appeal in A.S.No.69 of 2009 on the file of the Principle Subordinate Judge, Mayiladuthurai, wherein the First Appellate Judge independently analyzed the facts and evidence and concluded that the Will relied upon by the defendant, dated 26.12.2002, is the last Will of the testator and the same was proved by examining witnesses in the Will. On the other hand, the plaintiff has not proved the Will, thereby allowing the appeal by setting aside the findings of the learned trial Judge. Aggrieved over the reversed findings, the plaintiff has preferred this Second Appeal.

5. The Second appeal has been admitted on the following questions of law:

“i. *When the validity and genuineness of Ex.B-1 is under*



attack, whether the Lower Appellate Court erred in law holding that non-examination of the propounder of Will, Ex.B-1 is not fatal to his case?

ii. Whether the Lower Appellate Court erred in law in relying upon the evidence of D.W.1 for non-examination of the Defendant, when there is no whisper about his mental condition either in Ex.B-1 or in his Written Statement as well as in Ex.A-7?

iii. When the Defendant had filed Written Statement and executed a Sale Deed in favour of D.W.3, whether the Lower Appellate Court erred in law in holding that the defendant was not examined due to his mental retardness?

iv. When the wife and children of D.W.3 purchased a portion of the estate of the testator from the defendant who has no right to the properties, whether the lower appellate Court erred in law in holding that the suit is bad for non-impleadment of the said purchase?

v. Whether the findings of the Lower Appellate Court erred in law in holding that Ex.B-1 are perverse?

vi. Whether the lower appellate Court erred in law in holding that Ex.B-1 was the last Will of Kalyanin Ammal when the same is surrounded by suspicious circumstances, and the propounder had failed to dispel the same?"

6. The brief facts of the case are as follows:

The suit property, as described in the plaint schedule are rented property, originally belonging to one Kalyani. She enjoyed the same till her death on 31.12.2002. During her life time and dispute determined on



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07.03.2001, she executed a Will, which was registered on 07.10.2009, in favour of the plaintiff, who is her sister's grant daughter. The plaintiff's father namely Ganesan, had two wives. Kalyani's sister Paruvatham, is his first wife through which plaintiff was born and after the death of the 1st wife, Ganesan married the 2nd wife, and the defendant was born to the 2nd wife. In the said Will dated 07.03.2001, plaintiff was allotted with A Schedule property, and defendant was allotted with B schedule property. However, the defendant admitted unlawfully and trespassed into the property, for which he preferred a suit for declaration and other consequential reliefs.

7. The contention of the defendant is that the plaintiff is Kalyani's sister's daughter and also admitted the relationship with the plaintiff but denied the plaintiff's claim right over the property. He claimed right over the property based on the Will said to be executed by Kalyani on 26.12.2002, stating that the Will is the last will, through which most of the suit properties were allotted to the plaintiff and a portion of the property also allotted to the plaintiff. Both the plaintiff and defendant relied on two witnesses. Therefore, the plaintiff claims the right over the property based on the will dated 07.03.2001, and the defendant claims the right over the property based on the will dated 26.12.2002. Therefore, both the parties are bound to prove the Will which they are relied upon. Both the purchasers are also bound to establish



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that it is the last Will to the testator Kalyani. The relationship between the parties is an admitted one.

8. According to the plaintiff, P.W.1 / Santhi, her mother's sister Kalyani was unmarried. Out of love and affection, she executed the Will on 07.03.2001, in which A-Schedule was allotted to her, and B-Schedule property was allotted to the defendant. To prove the execution of the Will, the plaintiff examined the testator of the Will, which was examined as P.W.2. As per his evidence, he came to know the affidavit of Selvaragavan were the testator Kalyani and other witnesses were on 31.12.2002, and the Will was prepared and the affidavit read over to the testator, thereby she put her signature as well as thumb impression, and testator affixed signed as well as the affixed thumb impression, thereby this witness and another witness in the same and signed as attester. Subsequently, both of them identified the testator, accordingly, the Will was registered. She also stated that at the request of the testator, he wants their as witnesses. Another attester MathiAzhagan examined as D.W.3 and he also deposed on the execution of the Will, stating that on the execution of the witness as stated P.W.2, with regard to the execution of the Will. No contrary stated by the defendant and by relied upon the evidence of P.W.2 and P.W.3.



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9. The learned counsel for the appellant submitted that they discharged the burden of proof by examining those witnesses as record under Section 68 of the Evidence Act. In respect of the Will relied upon by the defendant marked as Ex.P.1, the defendant examined the attester of the Will as DW.2 and DW.3. Besides D.W 3 also purchased a portion of the property from the beneficiary, defendant immediately after the execution of P.W.7 on 09.02.2003, the witness Rajendiran purchased 2400 Sq half portion of the said property, in the name of his minor son Karthik by appointing his wife as guardian.

10. Admittedly, after the execution of Ex.B1/ Will, within 4 days, the testator Kalyani died. Therefore, the defendant claims Ex.B1 as a last Will. However, on seeing his evidence as well as the circumstances put forth to the plaintiff as well as the witnesses P.W.2 and P.W.3, he admits the execution of the earlier Will. But suggested that, the testator erroneously allotted a more extent of the property to the plaintiff, therefore he cancelled the earlier Will. Ex.A3 and Ex.B1- Will, though the plaintiff proved the execution of the Will, but he claimed the alleged Will Ex.B.1 is surrendered.

11. The learned counsel for the appellant argues that Ex.B1 relied upon by the appellant is not a true and valid one for the reason that in the said



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Will, the testator Kalyani has not cancelled the earlier Will standing in the name of the plaintiff dated 07.03.2001, nor mentioned about the Will in Ex.B1 itself, shows that false representing, the said Will was obtained by the defendant / Ganesan's father, in order to defraud the plaintiffs claim.

12. To substantiate the arguments, the learned counsel for the appellant relied on the ratio laid down in ***“1998-L.W.451, in the case of Rajammal V. Ramasami and three others”*** in which reads as follows:

“5. Two Wills are attrinuted to Kanniammal. One is Ex.A3 dated 19.02.1978. The sum and substance is as to which of the two Wills has to be accepted as true, valid and binding on the parties. So far as Ex.A-3 is concerned, it has been found to be true by both the Courts below. The trial Court held that it was valid and would govern the rights of parties. The trial Court also held that Ex.B1 was not true, valid or binding on the parties. But, the lower Appellate Court found Ex.B-1 to be true, valid and binding on all the parties.

13. Let us now have a look at the contents of Ex.B-1. Certain items had already been willed away under Ex.A3, which Will as already noticed had been accepted by the lower Appellate Court, though grudgingly as a conscious effort where the “pen had accompanied the mind”. There should have been a definite and specific mention of the execution of Ex.A-3 in Ex.B-1. There should have been a definite revocation, though it might not have been necessary to give the



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reasons for such revocation. The propounder D.W.1 says in his evidence that his mother did not tell him anything about the earlier Will and that he did not know about Ex.A-3.

.....

.....The contention of the learned Counsel for the third appellant is therefore well founded regarding the non-mentioning of the earlier Will is mentioned, a reason may have to be mentioned for revoking the same. If we look at the document itself, there are several.....”

13. Considering the submissions made by both sides' counsels and on a perusal of the Will – Ex.B1, there is no mentioning about the will dated 07.03.2001 relied by the plaintiff, nor there is any recitals about the cancellation of the said will. Admittedly, the plaintiff / Santhi is a close relative of the testator Kalyani than the defendant, for the reason that she is the testator's sister's daughter on the other hand, the defendant is the plaintiff's father's 2nd wife's son. Therefore, without mentioning the earlier Will, as well as not cancelled the said Will, as well as allotted more property to the defendant in Ex.B1, which itself created suspicious over the execution of the Will. The testator examined on the side of the defendant deposing that at the time to execution of Ex.B1 / Kalyaniammal was accompanied by the father of the defendant namely Ganesan / R2 which itself shows that Ganesan played the main role in execution of Ex.B1. It is an undisputed fact that, within 5



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days from the execution of Will Kalyani Ammal died. However, the age was 70 years in the Will relied upon by the plaintiff. But in the 2nd Will Ex.B1, the age of the testator was mentioned as 60 years, itself shows that the parties were not aware of the finding of the testator Kalyani. Furthermore, after Ex.B1 / Will, one of the witness Rajendiran / DW3 purchased 2400 sq.ft half of the portion in the suit property in the name of his minor son, within a short period. But, he contended that the plaintiff is a mentally regarded child, even that being so, how could the property can be sold to this D.W.3 by the defendant but claiming himself as a beneficiary under the Will.

14. It is pertaining to mention here that the defendant Palaniraj was entered into witness only Ganesan was examined as DW1. According to him, he was a mentally depressed person, he was not produced before this Court, but no medical records produced on the side of DW2 on his illness and his non-appearance before the Court has entitled and the same was rightly observed by the learned trial Judge, which needs no interference.

15. Non-production of the medical records about the illness of the defendant created a suspicious situation which was also rightly appreciated by the learned trial Judge, which needs no interference. However, the first Appellate Judge ignored those vital facts and dismissed the suit holding that



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the Will relied upon by the defendant is proved as a last Will, as such is totally erroneous and liable to be set aside. Accordingly, Questions of law 1 and 2 are answered.

16. As rightly pointed out by the counsel for the plaintiff stating that after the alleged Will Ex.B1 the defendant sold a portion of the property to one of the attesters of the Will DW3 for a lesser value also causes suspicious, for the reason that, if at all the defendant is a mentally regarded person how could he sell the property without obtaining any proper permission from the Court. Therefore, the alleged illness claimed by DW1 also not been acceptable and without any medical proof, the observation made by the First Appellate Judge is that due to illness the defendant was not able to examine as such is totally erroneous and it is liable to be set aside. Accordingly, the questions of law 3 and 4 are answered.

17. Furthermore, the observation made by the learned trial Judge, on the side of the defendant / respondent by examining witnesses on the side of the defendant prove that Ex.B1 is last Will accordingly earlier Will automatically become redundant because the 2nd will represented the last wish of the attester. To support his contention he relied upon the ratio laid down in the case of **Kasthuri Bai vs V.Ashok Kumar reported in 2017(2)CTC 35**, in



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which reads as follows;

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*“ It is also the contention of the learned counsel for the defendants in TOS.No.6 of 2005 that the earlier Will cannot be revoked in view of non mentioning of the same in the subsequent Will. In this context, it is useful to refer the judgment relied on by the learned counsel for the plaintiff in TOS.No.6 of 2005 in the case of **Mahesh Kumar v.Vinod Kumar and others** (cited supra), wherein the Hon'ble Apex Court has held that mere absence of a categorical recital in the subsequent Will about the cancelling of the earlier Will is not relevant because once the execution of the Second Will is held as duly proved, the earlier Will automatically becomes redundant because the Second Will represents the last wish of the Testator. Therefore, the contention of the Defendants cannot be countenanced in that aspect.”*

18. It is true that the defendant examined two witnesses who are the attesters of the alleged Will Ex.B1 but the witnesses of D.W.2 and D.W.3 reveal that at the time of alleged execution of Will, Kalyani was occupied by the defendant's father Ganesan in the auto. In fact, the defendant has not been presented at any point in time either during the trial or at the time of execution of the Will, whether he knows that there is a Will executed by the testator in his favour was also not duly established by examining the defendant as a witness. As discussed above the plaintiff is a close relative of the attester than the defendant. But, Ganesan who is the father of the plaintiff played a main role in getting the alleged Ex.B1 Will with an intention to grab



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the property in favour of his son who was born through his 2nd wife. The evidence of both DW2 and DW3 does not reveal that Ex.B1 Will was read over to the testator in their presence. The witnesses also not aware who has drafted the said Will, those witnesses were not aware that who has drafted the Will but they are closely associated with DW1 /Ganesan/ father of the defendant. Furthermore, immediately after the alleged Will the portion of the property was sold to DW3 by the defendant who alleged to be a mentally retarded person, all the circumstances caused suspicious over the execution of the Will and not been removed by the defendant beyond reasonable doubt. Therefore, the following authority relied upon by the defendant is not applicable to the present facts of the case for the reason that the defendant has not able to establish that Ex.B1 is the last will therefore the question of law 5 and 6 are answered.

19. When the defendant has not been proved that Ex.B1 is the last will, he has no right over the property. Therefore, the alleged sale made in favour of the DW2 / Rajendiran's Son Karthik is also invalid. Hence, the non-impleading of the said purchaser is not vital to the suit proceedings. Therefore, the observation made by the Lower Appellate Judge is also liable to be set aside. Accordingly, Question of law 5 is answered. The plaintiff has proved that Will dated 07.03.2001 is true and valid Will /Ex.A3.



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WEB COPY 20. In respect of Item 3, the plaintiff does not claim any relief for the reason that it is a burial ground and the same is also an acceptable one.

21. In view of the above discussion, the findings given by the learned Principal Subordinate Judge, Mayiladuthurai, in A.S.Nos.69 of 2009 dated 26.02.2010, is set aside. The judgement and decree passed by the learned District Munsif, Sirkali, in O.S.No.256 of 2003 dated 29.09.2009, is confirmed.

22. Accordingly, this Second Appeal is allowed. There shall be no order as to costs.

05.06.2024

Index : Yes/No
Speaking/Non Speaking order
Neutral Citation: Yes/No
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To

- 1.The Principal Subordinate Judge, Mayiladuthurai.
- 2.The District Munsif, Sirkali.
- 3.The Section Officer,
VR-Section, High Court of Madras.



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